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In the Supreme Court of the United States

OCTOBER TERM, 1978

MARK WILLIAM RICHARDSON AND
JOHN DOUGLAS GIBBS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that their prosecution for conspiring to commit various drug offenses is barred by their previous prosecution in Guatemala for drug trafficking.

1. Petitioners were indicted in the United States District Court for the Southern District of California for conspiring to import, possess with intent to distribute, and distribute cocaine, in violation of 21 U.S.C. 841, 846, 952, 960 and 963. They subsequently moved to dismiss the indictment on double jeopardy grounds. After a hearing, the district court denied the motion. On appeal of this denial, the court of appeals affirmed in a *per curiam* opinion (Pet. App. 23-27; 580 F. 2d 946 (1978)).

The evidence at the hearing on the motion to dismiss showed that on November 8, 1976, agents of the Federal Drug Enforcement Administration (DEA) received

information that two United States citizens would be transporting a large quantity of cocaine from El Salvador to the United States by way of Guatemala and Mexico (Pet. App. 24). DEA agents relayed this information to the national police in Guatemala (*ibid.*). Utilizing this information, Guatemala officials stopped petitioners at the Pedro de Alvarado Port of Entry as they entered Guatemala from El Salvador. A search of their belongings revealed approximately 13 kilograms of cocaine (*ibid.*; A. 109-110).[1]

Petitioners were tried in Guatemala and found guilty on the charge of "illegal trafficking" in narcotics (A. 119). They were sentenced to four years' imprisonment, commutable at the rate of half a quetzal for each day, and fined 4,000 quetzals (A. 120). Subsequently their sentence was increased to five years' imprisonment, commutable at the rate of five quetzals per day, and their fine increased to 10,000 quetzals (A. 128).[2] Petitioners paid their fines and a per diem amount in lieu of serving the sentences. They were returned to the United States in the custody of Guatemalan agents and delivered into the custody of DEA agents at the Los Angeles airport (A. 21).

2. Petitioners contend (Pet. 10-22) that the Double Jeopardy Clause, when read together with the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407 (1967), precludes the present prosecution.

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[1]"A." refers to the record an appeal.

[2]The court below noted (Pet. App. 24 n.1) that on the date of its opinion in this case a quetzal was worth about one United States dollar.

They now appear to concede that there is generally no double jeopardy bar to a federal prosecution that follows a prosecution in a foreign country (see Pet. 16).[3] They argue, however, that the "dual sovereignty" doctrine is inapplicable here because the Convention does not "condone[] multiple prosecutions." In particular, they rely on Article 36(2)(a)(iv) of the Convention, which provides that serious narcotics offenses "shall be prosecuted" by the country in whose territory the offense was committed, or by the country in which the offender is found if extradition is not acceptable to that country "and if such offender has not already been prosecuted and judgement [*sic*] given" (see Pet. App. 29).

But that provision simply states that no country is *required* to prosecute an offender if he has already been prosecuted elsewhere. The clause is intended to relieve countries that would consider the second prosecution a violation of their laws, or treaty obligations, from prosecuting (see Commentary on the Single Convention on Narcotic Drugs, *supra*, at 436, cited at Pet. 15). But the Convention does not prevent a country from prosecuting if it wishes to do so, and indeed the provision on which petitioners rely is specifically made "[s]ubject to the constitutional limitations of a Party, its legal system and domestic law" (Article 36(2)). Article 36 also provides it does not "affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party" (Article 36(4)).

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[3]Neither a state prosecution nor a prosecution by an Indian tribe bars subsequent federal prosecution, since in each case the actions are brought by separate sovereigns. *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Abbate* v. *United States*, 359 U.S. 187 (1959). Manifestly, since the United States and Guatemala are separate sovereigns that

In addition, the Convention specifically provides that each of the offenses specified, including trafficking in narcotics and conspiracy, "if committed in different countries, shall be considered as distinct offence[s]." Article 36(2)(a)(i) and (ii). The Convention, therefore, appears affirmatively to authorize the present prosecution of "distinct offenses" committed in a "different country."[4]

3. Petitioners also contend (Pet. 11, 16-19) that the United States was so involved in the Guatemalan prosecution that in effect Guatemala was only acting as its agent. But both courts below considered the factual basis for this claim and rejected it (Pet. App. 26; A. 135), and there is no need for further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, the cooperation of United States and Guatemalan officials in apprehending petitioners was standard police practice and did not transform the Guatemalan police—

" '[derive] power from different sources' " (*United States* v. *Wheeler*, *supra*, 435 U.S. at 320, quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)), the Guatemala conviction does not bar the proceedings here. See *United States* v. *Martin*, 574 F. 2d 1359 (5th Cir. 1978) (Bahamian narcotics conviction does not bar U.S. prosecution); see also *Bartkus* v. *Illinois*, 359 U.S. 121, 128 n.9 (1959) (declining to consider "dubious" English precedent on international double jeopardy).

The wisdom of the "dual sovereignty" doctrine is pointed up by this case. Petitioners were permitted to avoid imprisonment in Guatemala by paying a relatively insubstantial sum of money, although similar conduct could result in significant prison terms in the United States. See, *e.g.*, 21 U.S.C. 841(b)(1)(A).

[4]The indictment in this case alleges overt acts in the United States, Mexico, El Salvador and Guatemala.

let alone that country's courts—into agents of the United States. See *Bartkus* v. *Illinois*, 359 U.S. 121, 123-124 (1959). Petitioners do not contend that the Guatemalan prosecution was brought at the request of the United States (see Pet. 17-18); in fact, that country was merely carrying out its obligations under the treaty to prosecute persons who commit narcotics offenses in its territory (see Article 36(2)(a)(iv)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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